Supreme Court, U.S.
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No. 92-656

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARY JANE HOLLYDAY,

Petitioner,

v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, IN HIS OFFICIAL AND IN HIS PERSONAL CAPACITIES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Presley v. Etowah County Commission and Mack v. Russell County Commission, Nos. 90-711 and 90-712, 1992 WL 9046 (U.S.) 6

ARGUMENT

The Respondent' Brief in Opposition to Petition seeks to shift the focus of this case from the application of the doctrine of legislative immunity to Judge Luttig's suggestion that plaintiff failed to advance sufficient evidence in opposition to the summary judgment motion by raising that as their first reason for denying writ. However, neither Respondents' brief nor Judge Luttig's opinion set forth the essential procedural background which undermines the validity of such a position. First, the motion for summary judgment was filed by defendants prior to the conclusion of the pleadings in the case. No discovery had been undertaken by any of the parties at the time of its filing. The motion by its very terms was "on the grounds that plaintiff's action is

barred by legislative immunity." Defendant Thornberry also sought summary judgment "on the grounds that he is entitled to qualified immunity". Joint Appendix p. 46.

Contemporaneously with the filing of their motion for summary judgment, the defendants filed a motion to stay discovery "until the issues raised by defendants' motion for summary judgment on the grounds that plaintiff's action is barred by legislative immunity and qualified immunity are resolved." In ruling on the defendants' motion to stay discovery, the magistrate ordered that "discovery shall be stayed from the date of entry of this Order until such time as a recommendation is entered on the Motion for Summary Judgment, except that discovery shall remain open on matters

concerning the Motion for Summary Judgment". (Neither the motion for stay nor the magistrate's order, both quoted from above, were included in the Joint Appendix because they were not relevant to the appeal.) The discovery undertaken was thus limited to whether the action was barred by legislative immunity (a legal issue) and whether Thornberry was entitled to qualified immunity. Consequently, the defendants who were county commissioners were not deposed. Only defendants Thornberry and Kirstein were deposed. In fact during these depositions the defendants' attorney instructed them not to answer questions propounded concerning the executive session in which the commission discussed plaintiff's position. See, for example, Joint Appendix, p. 358. The magistrate's memorandum and

recommendation which was adopted by the district court and ultimately by Judge Hall was not grounded on any lack of evidence. In fact, it said that "(t)o the extent the submitted affidavits go to the motives behind the board action, they have not been considered because issues of motive are not reached unless procedural bars are overcome. Plaintiff cannot overcome the absolute bar of legislative immunity. While courts traditionally abhor procedural default, the doctrine of legislative immunity is firmly rooted in the development of this country's jurisprudence." [Footnote deleted] Joint Appendix, p. 533. Therefore, the appeal to the Fourth Circuit was based on this proposition of law; and the issue of whether there was sufficient evidence adduced was not raised until it appeared

in Judge Luttig's opinion. Moreover, as stated in Judge Butzner's dissenting opinion "a genuine issue of material fact exists concerning her claim of a constitutional tort and the County's claim that efficiency and economy dictated the elimination of the two positions." Petition, p. 27a. In light of this, it is unseemly for the Respondents to argue in their brief that:

> It is important at the outset to note, however, that the decision of the Fourth Circuit did not turn on the issues raised by plaintiff in her Petition. Instead, the Fourth Circuit's decision was based on the particular facts of this case and on Judge Luttig's conclusion that plaintiff failed to meet her evidentiary burden under Fed. R. Civ. P. 56.

Respondents' Brief, p. 8.

This simply was not the case.

Finally, the Petitioner invites this Court's attention to the cases of

Presley. v. Etowah County Commission and Mack v. Russell County Commission, Nos. 90-711 and 90-712, 1992 WL 9046(U.S.) decided by this Court on January 27, 1992. In those cases two boards of county commissioners in Alabama made changes in the powers of individual county commissioners over road operations in their respective districts in an alleged attempt to dilute the power of newly elected black county commissioners. This Court noting that the Voting Rights Act under which the actions were brought does not apply to all forms of "pernicious discrimination" affirmed the dismissal of the lawsuits. However, in dicta, this Court noted that: "Nothing we say implies that the conduct at issue in these cases is not actionable under a different remedial scheme." (Page 11) Clearly, what

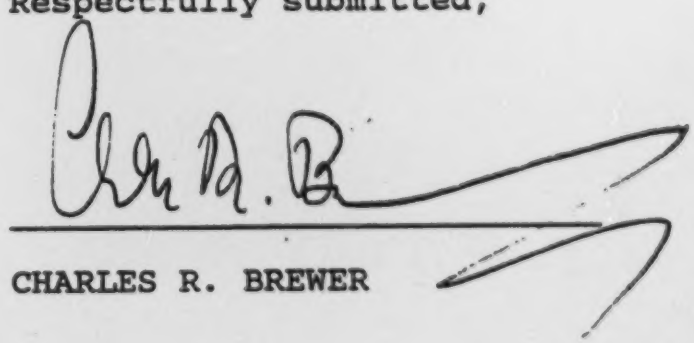
was at issue in those cases was the legality of local "legislative" acts that allegedly violated the Constitutional rights of the newly elected black commissioners. The Alabama legislature had passed enabling legislation to permit the counties to make such changes. Similarly, the North Carolina legislature has authorized boards of commissioners to abolish positions. Brief in Opposition, p. 1a. However, it is respectfully contended that in neither case may the commissioners exercise the authority given to them under state law with an unconstitutional motivation. As quoted above this Court said that under the correct remedial scheme that the cases would be actionable. This strongly suggests that the doctrine of legislative immunity will not bar actions based on

local "legislative" acts that violate an individual's constitutional rights. Certainly the issue would be in any such action whether or not the "legislative" actions in question were motivated by a desire to deprive individuals of their constitutional rights. In the Alabama cases, the issue would be whether the motive was an unconstitutional race based discrimination against black county commissioners in violation of the Fourteenth Amendment. In the case presented by this petition the issue is whether the motive was an unconstitutional political based discrimination against a public employee in violation of the First Amendment.

CONCLUSION

For the reasons set forth above along with the reasons contained in the Petition and those contained in the Brief of the Southern States Police Benevolent Association as Amicus Curiae in Support of Petitioner, Petitioner renews her request that the Court grant her petition for writ of certiorari, and reverse the judgment below.

Respectfully submitted,



CHARLES R. BREWER

November 21, 1992